(4)

No. 89-979

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

BAUSCH & LOMB INCORPORATED,
a Corporation,
Petitioner,
VS.
HEWLETT-PACKARD COMPANY,
a Corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES W. COLBERT, III
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071
(213) 669-6000
Attorneys for Petitioner Bausch & Lomb Incorporated

BERNARD D. BOGDON, Esq.
Bausch & Lomb Incorporated
One Lincoln First Square
Post Office Box 54
Rochester, New York 14601

Of Counsel:
RICHARD W. BUCKNER
O'MELVENY & MYERS
LAURENCE H. PRETTY
PRETTY, SCHROEDER,
BRUEGGEMAN & CLARK
444 South Flower Street
Suite 2000
Los Angeles, California 90017

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

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Petitioner Bausch & Lomb Incorporated ("Bausch & Lomb") respectfully submits the following brief reply to the arguments of Hewlett-Packard Company ("Hewlett-Packard") in its Brief in Opposition to Petition for Certiorari ("Opposition").

I.

HEWLETT-PACKARD'S OPPOSITION ATTEMPTS TO DISTORT THE ISSUE PRESENTED.

Predictably, Hewlett-Packard attempts to trivialize the issues presented by this petition. Thus, Hewlett-Packard

suggests that Bausch & Lomb's position is that a possible source of bias, no matter how trivial, becomes disqualifying merely because it is unknown to the litigants and suggests that adoption of Bausch & Lomb's position would mean that "a judicial *voir dire* would be necessary . . . ." (Opposition at 5.) Bausch & Lomb makes no such contention.

The potential source of bias involved in this matter — the employment of the judge's son by Hewlett-Packard — does not raise trivial or marginal questions. As the Federal Circuit itself recognized in the opinion for which review is sought, this circumstance involves "a serious question of impartiality." (Appendix to Petition for Writ of Certiorari at 28a.) Nor does this case involve a circumstance in which the trial judge overlooked or did not recognize the serious source of bias. To the contrary, as already noted in the Petition (page 5) Judge Aguilar has confirmed that he was fully cognizant of the circumstance and of its importance, but made the deliberate choice not to disclose it to the litigants.

This case involves the conscious decision of a trial judge to conceal facts of unquestioned importance respecting his impartiality. Whether one disagrees with this decision — as does Bausch & Lomb — or agrees with it — as Hewlett-Packard professes to do — the question of propriety that it raises can hardly be characterized as trivial. The universal adoption of Judge Aguilar's approach will mean, as a practical matter, the end of any effective means for litigants to test the impartiality of those who weigh the evidence and sit in judgment on the credibility of testimony presented. A judicial decision that is undisclosed, and hence unknown, can never be reviewed. Whatever one's personal views of the merits of

this controversy, it is not possible to characterize it as unimportant to the integrity of our system of justice.

II.

HEWLETT-PACKARD'S ATTEMPT TO RECONCILE THE DECISION BELOW WITH THE DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS MISSES THE POINT.

Again predictably, Hewlett-Packard attempts to dismiss the striking disparity between the approach recommended by the Federal Circuit in this matter and that advocated by this Court in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) and by the Seventh Circuit in *In Re National Union Fire Insurance Company*, 839 F.2d 1226 (7th Cir. 1988). Hewlett-Packard cannot dispute — indeed it concedes — that the procedure approved by the Federal Circuit is at odds with those contemplated in *Liljeberg* and *National Union Fire Insurance*. Hewlett-Packard emphasizes, however, that neither of those cases includes within its express holding that a trial judge is *obligated* to follow the procedures being recommended and encouraged. (Opposition at 6-8.) This observation is true, but it misses the point.

Neither *Liljeberg* nor *National Union Fire Insurance* holds that a trial judge is obligated to disclose sources of bias known to him because neither case had that issue presented. If the issue had been presented, and particularly if the issue had been presented to this Court in *Liljeberg*, there would be no need for the present petition. The principle of law now urged by Bausch & Lomb would already be an accepted part of our jurisprudence. The fact that the issue was not squarely presented — and, hence, not formally embodied in this Court's holding in *Liljeberg* — allowed the Federal Circuit to pronounce the

erroneous and pernicious principle approving judicial concealment that is now at issue.

The circumstance identified by Hewlett-Packard argues for, and not against, the granting of certiorari. Without the express contrary holding of this Court, the argument successfully urged by Hewlett-Packard before the Federal Circuit will continue to work mischief, now aided by the Federal Circuit opinion for which review is sought. If the recommendations of the Federal Circuit in this area are taken to heart by the trial court judiciary, the procedure so clearly advocated in *Liljeberg* — the early and full disclosure of all sources of bias — will simply become an endangered species.

This case presents the clearest and best opportunity for this Court to prevent so unfortunate a development in our law. This case presents no ambiguities. The importance of the fact withheld is undisputed. The knowledge of the district judge of the fact is conceded, as is his knowledge of the importance of the fact. Nor is there any question as to the deliberate nature of his decision to withhold the fact or of the ignorance of both litigants as to the existence of the fact. It is unlikely that there will ever be a case whose facts present this issue more clearly.

III.

HEWLETT-PACKARD'S COMPLAINT THAT THE PRESENT PETITION IS NO MORE THAN LITIGATION TACTICS IS ALTOGETHER DISINGENUOUS.

Hewlett-Packard's final argument in its Opposition (pages 8-11) is a polemic condemning Bausch & Lomb's petition as the tactic of an unsuccessful litigant who

merely seeks to achieve a more favorable result.[1] This argument evidences a *naivety* that is difficult to credit to so sophisticated an organization.

It is the nature of our judicial system that successful litigants do not seek review — indeed are not permitted to seek review — of principles of law for purely altruistic reasons. As a consequence, appellate arguments are always presented by parties who have realized an unfavorable result below and hope to improve their lot. If such an observation were sufficient to preclude review of the arguments presented, the American taxpayer could be saved the expense of providing for this Court and for all of the other appellate courts of the United States.

Hewlett-Packard's complaint that the present petition is tactical also grossly misstates the record below. As its principal contention for the proposition that Bausch & Lomb does not seriously question the impartiality, or the appearance of impartiality, of Judge Aguilar, Hewlett-Packard notes that no request has been made that Judge Aguilar's summary judgment in favor of Bausch & Lomb in a companion case involving title issues be reversed on the grounds of bias. But Hewlett-Packard chooses to ignore that Bausch & Lomb has also declined to seek reversal of Judge Aguilar's partial summary judgment *in*

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[1] To bolster its *ad hominem* attack on Bausch & Lomb, Hewlett-Packard also quotes liberally from Judge Aguilar's adverse opinion below. (Opposition at 2.) The quotes are taken out of context, and the opinion is not as starkly critical of Bausch & Lomb as Hewlett-Packard's brief suggests. It is to be conceded, however, that Judge Aguilar's opinion evidences that Bausch & Lomb did not meet with favor in his eyes. But it is hardly supportive of Hewlett-Packard's position to observe that a judge whose impartiality is subject to reasonable doubt has, in fact, displayed antipathy toward Bausch & Lomb.

favor of Hewlett-Packard in the instant case.[2] In fact, Bausch & Lomb has sought reversal of no decision made by Judge Aguilar — either favorable or unfavorable — by reason of his son's employment by Hewlett-Packard where the decision in question involved the resolution of matters of law based upon undisputed facts rather than factual determinations that turned on the weighing of evidence and the judgment of the credibility of witnesses. In the former case, of course, appellate review is *de novo* and each litigant's rights are fully protected in the Court of Appeals, regardless of the personal bias of the trial judge who first addressed the matter.

There is no inconsistency — or tactical disingenuousness — in Bausch & Lomb's position. Where the trial judge is effectively the final arbiter of an issue, as is the case when the trial judge sits as trier of fact, both litigants — Hewlett-Packard as well as Bausch & Lomb — are entitled to an arbiter whose impartiality is subject to no second guessing. Judge Aguilar did not satisfy that criterion.

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[2] The order granting partial summary judgment to Hewlett-Packard is discussed in the Federal Circuit Opinion. (Appendix to Petition for Writ of Certiorari at 6a.)

IV.

CONCLUSION.

For these reasons, and for the reasons set forth in the petition itself, Bausch & Lomb respectfully submits that certiorari should issue.

DATED: January 26, 1990

Respectfully submitted,

O'MELVENY & MYERS
JAMES W. COLBERT, III
Attorneys for Petitioner
Bausch & Lomb Incorporated

Of Counsel:

Richard W. Buckner
O'Melveny & Myers

Laurence H. Pretty
Pretty, Schroeder, Brueggeman & Clark

Bernard D. Bogdon
Bausch & Lomb Incorporated